



Mitchell Hamline School of Law
Mitchell Hamline Open Access

Faculty Scholarship

2011

Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior Under the Dormant Commerce Clause Doctrine

Mehmet K. Konar-Steenberg

Mitchell Hamline School of Law, mehmet.konar-steenberg@mitchellhamline.edu

Anne F. Peterson

Publication Information

80 UMKC Law Review 139

Repository Citation

Konar-Steenberg, Mehmet K. and Peterson, Anne F., "Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior Under the Dormant Commerce Clause Doctrine" (2011). *Faculty Scholarship*. Paper 215.
<http://open.mitchellhamline.edu/facsch/215>

This Article is brought to you for free and open access by Mitchell Hamline Open Access. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.



mitchellhamline.edu

Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior Under the Dormant Commerce Clause Doctrine

Abstract

This study examines judicial behavior under the dormant Commerce Clause doctrine by drawing on an original database of 459 state and Federal appellate cases decided between 1970 and 2009. The authors use logit regression to show that state judges are more likely to uphold state and local laws against dormant Commerce Clause attack than their Federal judicial counterparts, a result that is consistent with the interstate rivalry issues animating the doctrine. The study also finds that Republican-dominated judicial panels at the state level are more likely to side with tax challengers invoking the dormant Commerce Clause doctrine than are Democratic judicial panels. The authors found similar results on tax issues at the Federal level between the years 1993 and 2009. These results suggest that among more conservative judges, traditional anti-regulation attitudes may hold more sway than federalism and judicial restraint. These findings provide insight into the connections between forum selection, politics, and judicial behavior under the doctrine and open avenues for further research.

Keywords

dormant commerce clause, interstate commerce, federalism, judicial behavior, free markets, tax injunction act, empirical, courts

Disciplines

Constitutional Law | Courts | Judges | Jurisdiction | Law and Society

FORUM, FEDERALISM, AND FREE MARKETS: AN EMPIRICAL STUDY OF JUDICIAL BEHAVIOR UNDER THE DORMANT COMMERCE CLAUSE DOCTRINE

Mehmet K. Konar-Steenberg* & Anne F. Peterson**

I. INTRODUCTION

Although the dormant Commerce Clause doctrine has generated an extensive body of theoretical and critical scholarship,¹ the literature is almost devoid of systematic empirical assessments of the case law.² This article seeks to fill that gap by presenting the results of an empirical study of 459 published dormant Commerce Clause doctrine cases decided by state and federal appellate courts between 1970 and 2009, including a special subset of cases involving tax issues spanning 1992 through 2009.³

This article assesses several hypotheses drawn from the extant literature on judicial behavior concerning the impact of forum selection, party ideology, geography, and popular attitudes about governmental regulation on dormant Commerce Clause case outcomes. From the data, we reach five conclusions, briefly summarized below:

* Associate Professor of Law, William Mitchell College of Law.

** Ph.D., political science, Washington University (St. Louis); J.D., William Mitchell College of Law.

The authors wish to thank Tom Lauria for his research assistance; Professor Brannon P. Denning and Dr. Barbara S. Kinsey for their insightful comments on earlier drafts; and the faculty of William Mitchell for their feedback on our initial research design. An earlier version of this study was presented at the Conference on Empirical Legal Studies (CELS) at Yale University, New Haven, Conn., on November 6, 2010; the authors wish to thank the CELS participants for their feedback.

¹ A Westlaw search in the JLR database for articles with the words “dormant” and “commerce” in the title returns more than 200 documents. For examples of recent scholarship, see Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541 (2010); Edward A. Zelinsky, *The False Modesty of Department of Revenue v. Davis: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine*, 29 VA. TAX REV. 407 (2010); Norman R. Williams & Brannon P. Denning, *The “New Protectionism” and the American Common Market*, 85 NOTRE DAME L. REV. 247 (2009).

² In fact, we are aware of only one empirical study—an examination of whether participation by state and local government plaintiffs affected dormant Commerce Clause case outcomes before the United States Supreme Court. See Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233 (1999).

³ For each case in our study, we gathered data on numerous demographic and political variables. The dataset and codebook are available to anyone who wishes to replicate the study upon request. This study follows established empirical research methodologies standard in social scientific research. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002).

A. The Judicial Forum Matters

Every properly pled dormant Commerce Clause case alleges that state and local governments have improperly favored local interests.⁴ Our study uses this fact to explore the important and widespread assumption that state courts are more likely than federal courts to favor in-state interests over out-of-state interests. This assumption about judicial behavior, which we call “diversity bias,” is so ingrained in our judicial systems that it undergirds the existence of federal diversity jurisdiction. Our analysis tends to lend credence to this concern. Specifically, our data show that state courts are more likely to uphold state and local laws against dormant Commerce Clause attack than their federal counterparts.

B. Judicial Politics Matters

We set out to explore whether any relationship exists between judges’ political affiliations and dormant Commerce Clause outcomes. Our task was complicated by the existence of countervailing ideological values concerning federalism and free markets. Conservative federalist ideology (i.e. “New Federalism”) emphasizes states’ rights and therefore favors upholding state laws against dormant Commerce Clause attack. In contrast, conservative free market ideology disfavors regulation and therefore leans towards invalidating state laws under the doctrine. We nevertheless hypothesized that liberal and conservative attitudes shaped by the Supreme Court’s pronouncements on New Federalism would be the most powerful predictors of case outcomes.

Our findings regarding this “ideological bias” hypothesis were surprising in some ways. In state court non-tax cases, political ideology was not a significant factor; instead, judicial panels were influenced most by the forum. But in state court cases that did involve tax issues, Republican-dominated panels were more likely than Democrat-dominated panels to strike down challenged tax laws. Similarly, within federal appellate courts during the 1993-2009 timeframe, Republican-dominated judicial panels were more likely than Democratic panels to invalidate state regulations on dormant Commerce Clause grounds. These outcomes are consistent with traditional liberal and conservative positions on government regulation of markets, and are at odds with what we would have expected if Supreme Court-level debates over federalism were having a strong effect on lower and state courts.

⁴ As explained in Part II, *infra*, dormant Commerce Clause cases encompass both allegations of rank economic protectionism as well as allegations that a law’s purported local benefits do not justify its impacts on interstate commerce.

C. Geography Doesn't Matter Much

We also observed that states with a larger number of shared borders with neighboring states are just as likely as states with fewer state neighbors to have their laws struck down as unconstitutional under the dormant Commerce Clause. We hypothesized that states with a larger number of neighboring states would “learn” through experience that it is mutually beneficial to allow for unfettered interstate commerce and are less likely to try to protect local industries with protectionist laws of the sort that may inspire retaliatory measures in neighboring states. Yet this does not appear to be the case. For the most part the results were the same regardless of the number of shared borders.

D. Progressive States Uphold State Regulation

Our analysis finds that judicial panels in progressive states with a stronger commitment to financial expenditures targeted at specific populations such as welfare, hospitals, and health care relative to other policy issues are more likely to uphold a challenged state regulation as constitutional. On the other end of the spectrum, judicial panels from states that restrict state expenditures to broad based services such as infrastructure, police, and highways are more likely to rule a disputed state regulation as invalid.

E. The Federal Tax Injunction Act May Have Unintended Consequences

The Federal Tax Injunction Act (FTIA) effectively bars plaintiffs from challenging state tax laws in the federal court. This means that nearly all dormant Commerce Clause tax claims are shunted into state court systems. While the Supreme Court has stated that the Act serves federalism and fairness goals, the net result for dormant Commerce Clause plaintiffs seems at odds with these goals. Such plaintiffs have no choice but to utilize courts whose behavior, in the aggregate, suggests pro-state bias. Moreover, the strength of the ideological bias that we observed may well be amplified by the more overtly politicized selection and retention procedures used in many state judicial systems as compared to the federal courts, undermining the fairness rationale.⁵ Given the patterns of judicial behavior we identify here, policy-makers may wish to reconsider whether the federalism- and fairness-based justifications for the law are really justified.

Our article is organized in five substantive parts. Part II provides a brief overview of the dormant Commerce Clause doctrine and its justifications, with attention to both the general doctrine and the more specialized doctrine

⁵ Curiously, the findings also show that out-of-state appellants are more likely to win before a state court than in-state appellants. A possible explanation for this observation is that out-of-state parties confront potentially higher litigation transaction costs than in-state plaintiffs and therefore press only those claims with the best chances of success.

applicable to tax cases. Part III presents the study's hypotheses in greater detail. Part IV describes our research methodology and findings. Part V offers some potential explanations for those findings. Part VI focuses on the FTIA and offers some normative recommendations for squaring the interests undergirding that law with our findings.

II. OVERVIEW OF DORMANT COMMERCE CLAUSE DOCTRINE

This section provides an overview of the general dormant Commerce Clause doctrine, including its susceptibility to strategic behavior by judges, as well as a discussion of the doctrine applicable to the subset of cases involving challenges to state and local tax laws.

A. The General Doctrine, its Justifications, and Opportunities for Strategic Behavior

The dormant Commerce Clause doctrine has evolved considerably since it was first enunciated by the Supreme Court in the 1800s.⁶ Over the decades, the Court has experimented with and abandoned several dormant Commerce Clause analytical frameworks.⁷ The current framework, which has proven to be relatively durable, began to emerge in late 1940s and firmed up in 1970 with the Court's decision in *Pike v. Bruce Church, Inc.*⁸ This modern version of the doctrine has two components, aimed at two different kinds of state interference with interstate commerce. In each of these two prongs, judges are empowered to make choices that may reflect their own policy preferences.

The first component of the doctrine targets rank economic protectionism. Laws that discriminate against interstate commerce, meaning laws granting in-state economic interests advantages over out-of-state economic interests, are subject to judicial scrutiny so strict that the Court has described such laws as almost per se invalid.⁹ Examples of the kinds of protectionist measures that have been invalidated under this prong of the doctrine include embargos, tariffs, and local processing requirements.¹⁰ Protectionist laws will survive this level of scrutiny only if they serve valid governmental purposes and no non-

⁶ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁷ See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, §§ 5.3.1-.3 (3d ed. 2006).

⁸ 397 U.S. 137, 142 (1970).

⁹ *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

¹⁰ See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating state landfill law imposing embargo on waste imported from out of state); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (invalidating as tariff a tax and subsidy arrangement benefiting in-state dairy interests at expense of out-of-state dairy interests); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (invalidating Madison laws prohibiting sale of milk unless bottled within a few miles of city center).

discriminatory alternatives exist; only once in the Supreme Court's jurisprudence has a law survived this level of scrutiny.¹¹

Second, the doctrine targets non-protectionist state laws that impose burdens on interstate commerce disproportionate to their benefits. Under this prong of the doctrine, judges are empowered to make value judgments concerning the relative merits of state and local laws in comparison with their incidental burdens on interstate commerce. The precise formulation, which comes from *Pike*, is that a non-discriminatory law serving a valid governmental interest will be upheld unless its benefits are clearly outweighed by the law's incidental burdens on interstate commerce.¹² The phrase "clearly outweighed" suggests that this formulation is more deferential to state and local interests than the strict scrutiny analysis reserved for discriminatory laws. Even so, this prong of the doctrine has been used to invalidate state laws aimed at traditional police power concerns, such as highway safety.¹³

Of course, this complex doctrine is not actually stated in the Constitution. Instead, the judiciary has developed it on the theory that Congress's express power to regulate interstate commerce demands a corollary limitation on state power over interstate commerce.¹⁴ This judge-made character has generated significant controversy about how and whether the doctrine's substance (and even its existence) is justified. The most common justification is framed in political terms: Allowing states to favor their own, as it were, is likely to lead to the kinds of dangerous and divisive interstate rivalries that federal control over commerce was meant to remedy.¹⁵ Some judges and commentators also suggest that the doctrine is justified because it encourages economic efficiency, a rationale that is more difficult to connect to the constitutional text.¹⁶ In any event, concerns about the judge-made, textual nature of the doctrine have led prominent originalists on the United States Supreme Court to argue in favor

¹¹ See *Maine v. Taylor*, 477 U.S. 131 (1986).

¹² *United Haulers Ass'n*, 550 U.S. at 346.

¹³ *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981). This branch of the doctrine has also been used to invalidate state laws that seek to regulate "commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (citations omitted).

¹⁴ See CHEMERINSKY, *supra* note 7, at 419-20.

¹⁵ See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (central rationale for the rule against discrimination is to prohibit local economic protectionism "that would excite those jealousies and retaliatory measures the Constitution was designed to prevent"); *Hughes v. Oklahoma*, 441 U.S. 332, 325 (1979) (Commerce Clause reflects central concern of Framers to resolve economic Balkanization that plagued the union under the Articles of Confederation); letter from James Madison to George Washington (Apr. 16, 1787), *quoted in* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 627 (1999) (Madison calling for a "negative" power to prevent "rival and spiteful measures" among states).

¹⁶ See Mehmet K. Konar-Steenberg, *One Nation of One Market? Liberals, Conservatives, and the Misunderstanding of H. P. Hood & Sons v. Du Mond*, 11 U. PA. J. CONST. L. 957, 962-64 (2009).

of limiting¹⁷ or even ending¹⁸ the doctrine; these views have not yet garnered a majority of the Court.

A related critical theme is that the judicially elaborated nature of the doctrine enables judges to decide cases based on personal policy preferences. In fact, the so-called “*Pike* balancing” prong of the dormant Commerce Clause analysis practically demands it. Justice Scalia seemed to have something like this in mind when he famously observed that *Pike* balancing calls upon judges to determine “whether a particular line is longer than a particular rock is heavy.”¹⁹ The vague, open-ended nature of the *Pike* test invites judges to second-guess state and local legislative judgments about the importance of particular legislative interests and the acceptable levels of commercial interference.²⁰ It is not difficult to imagine how a judge’s own policy judgments might color this second-guessing.

Strict scrutiny probably leaves less room for judicial policy-making. Although the terms of the strict scrutiny test call for similar judgments about the relative weight of the state interest, once a law is found to be discriminatory the heavy weight of precedent, which has yielded a fatal-in-fact test, leaves less room for judicial maneuver than the more open-ended *Pike* analysis. Yet the threshold question of whether a state law discriminates often requires examination of legislative motives and the vexing question of discriminatory effect.²¹ Overall, the initial, threshold inquiries required by the dormant Commerce Clause doctrine provide key opportunities for judges to express their policy preferences while crafting their decisions.

B. The More Specialized Doctrine As Applied to Tax Laws and the Tax Injunction Act

The Court has analyzed dormant Commerce Clause challenges to state and local tax laws on a track that is ostensibly separate from the general doctrine,

¹⁷ See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (Scalia, J., concurring in part and dissenting in part) (“I write separately to reaffirm my view that the so-called ‘negative’ Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain.”) (internal quotations omitted).

¹⁸ *Id.* at 349 (Thomas, J., concurring in judgment) (“Because this Court has no policy role in regulating interstate commerce, I would discard the Court’s negative Commerce Clause jurisprudence.”).

¹⁹ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

²⁰ *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), provides a good illustration. The issue there was whether Iowa’s restrictions on truck length unduly burdened interstate commerce. 450 U.S. at 665-67. The trial court found that the two truck configurations represented different safety risks. *Id.* at 668. The court then translated this factual finding into a legal determination that the legislature’s prohibition did not increase safety. *Id.*

²¹ See John M. Baker & Mehmet K. Konar-Steenberg, “*Drawn from Local Knowledge . . . and Conformed to Local Wants*”: *Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 LOY. U. CHI. L.J. 1 (2006) (identifying criticisms of the discriminatory effects aspect of the doctrine).

yet it parallels that doctrine in important ways. The modern tax doctrine, which congealed in the Court's 1977's decision in *Complete Auto Transit, Inc. v. Brady*, established a four-part inquiry: (1) Does the taxed activity have a sufficient nexus to the taxing state? (2) Does the tax discriminate against interstate commerce? (3) Is the tax unfairly apportioned? (4) Is the tax unrelated to services provided by the taxing state?²² As these four questions suggest, there is some overlap between the *Complete Auto* test and the more general doctrine. In particular, both the general doctrine and the *Complete Auto* test invite courts to probe the legitimacy of the putative purpose of the challenged state or local law, and both are explicitly concerned with protectionism, and if one compares the "nexus" and "fair apportionment" elements with cases like *Healy*, one sees that both doctrines are also concerned with extra-territorial reach.²³

These doctrinal overlaps notwithstanding, tax and non-tax claims continue to differ in one key respect: while non-tax dormant Commerce Clause claims are routinely considered by both federal and state courts, tax cases are heard almost exclusively by state courts as a result of the combined operation of the Eleventh Amendment and the Federal Tax Injunction Act (FTIA).²⁴

²² 430 U.S. 274, 277-78 (1977).

²³ The Court's 2008 decision in *Department of Revenue v. Davis*, 553 U.S. 328 (2008), further blurred the lines between tax-specific and general dormant Commerce Clause doctrine. The case dealt with a Kentucky law that provided preferential state income tax treatment for bonds issued by Kentucky government versus those issued out of state. 553 U.S. at 332-33. Although the case ostensibly involved a tax provision, the Court's opinion did not cite *Complete Auto*. Instead, the Court noted that the "modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism,'" and went on to recite the tests for discrimination/strict scrutiny and non-discrimination/*Pike*-balancing. *Id.* at 337-39 (citations omitted). It then upheld the availability of the tax preference under a relatively recent elaboration on the general dormant Commerce Clause doctrine that excludes from the definition of discrimination state/local laws intended to benefit state/local enterprises engaged in a "traditional government function." *Id.* at 339-42. The Court's handling of this case under the general doctrine rather than *Complete Auto* suggests that in discrimination cases, at least, the differences between the two may not be significant. Prior to *Davis*, commentators were already questioning the Court's handling of tax cases under the dormant Commerce Clause. See, e.g., Edward A. Zelinsky & Brannon P. Denning, Debate, *The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation*, 155 U. PA. L. REV. PENNUMBRA 196 (2007), available at <http://www.pennumbra.com/debates/debate.php?did=7>; Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1 (2008). After *Davis*, the questions multiplied. In particular, *Davis* heightened academic interest in whether the "traditional government function" innovation was simply an asterisk on the general definition of discrimination or marked a major shift in dormant Commerce Clause doctrine. See, e.g., Dan T. Coenen, *Where United Haulers Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 Iowa L. Rev. 541 (2010) (arguing that this development is "destined to have a far-reaching . . . impact"). More specific to the tax doctrine, after *Davis* it is not entirely clear what has become of *Complete Auto*. True, nothing in *Davis* overrules *Complete Auto*. But the Court's failure even to acknowledge its existence raises questions about the circumstances under which it will or will not be applied.

²⁴ 28 U.S.C. § 1341 (2011).

The Eleventh Amendment, as interpreted by the Court, prohibits suits for damages, restitution, or other forms of relief requiring disbursements from a state treasury in a federal court, while allowing suits against state officials in their individual capacities for injunctive relief.²⁵ Thus, under modern Eleventh Amendment doctrine, a dormant Commerce Clause suit seeking a refund of taxes paid under an allegedly discriminatory tax law would probably be barred, but claims for injunctive relief against enforcement of a discriminatory state tax law would likely be constitutionally permissible.

The FTIA forecloses recourse to state courts in such cases, providing, “The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”²⁶ The Supreme Court’s original, constitutional jurisdiction over disputes between states and its certiorari jurisdiction over appeals from state high courts are not affected by this prohibition, but the Court has hesitated to read any further exceptions into the statute.²⁷

The combined effect of these constitutional and statutory barriers is to shunt nearly all dormant Commerce Clause tax cases into state courts. Given this feature of the litigation landscape and the fact that *Complete Auto* still appears to be good law notwithstanding *Davis*, our discussion below distinguishes between tax and non-tax cases where relevant.

C. Summary

As the overview above suggests, the dormant Commerce Clause doctrine is the source of controversy on several fronts. The doctrine seems to invite judicial policy-making in some respects. There is fundamental disagreement about the doctrine’s purposes and some of its analytical contours. And at the Supreme Court, some doubt whether the doctrine should continue to exist at all. We take these potential flashpoints as the starting points for the hypotheses discussed in part III below.

III. OUR HYPOTHESES

This section describes the three hypotheses about the dormant Commerce Clause doctrine which we developed for this study: (1) the diversity bias hypothesis, which predicts a difference between dormant Commerce Clause outcomes in state and federal courts; (2) the ideological bias hypothesis, which predicts a difference in how liberal and conservative judges will rule in dormant Commerce Clause cases; and (3) the shared borders hypothesis, which predicts

²⁵ U.S. CONST. amend. XI. See generally CHEMERINSKY, *supra* note 7, at 193-215.

²⁶ 28 U.S.C. § 1341 (2011).

²⁷ LINDA MULLENIX, MARTIN REDISH & GEORGENE VAIRO, UNDERSTANDING FEDERAL COURTS AND JURISDICTION 430 (1998).

states with more shared borders learn to craft laws that are less susceptible to dormant Commerce Clause challenges.

A. Diversity Bias Hypothesis

Our first hypothesis is inspired by the kinship between the justifications underlying dormant Commerce Clause doctrine and federal diversity jurisdiction. As the overview above suggests, the dormant Commerce Clause doctrine (not to mention the constitutionally explicit Privileges and Immunities Clause) reflects the long-standing assumption that state legislative and executive officials will improperly favor in-state interests over out-of-state interests. Federal diversity jurisdiction reflects similar concerns about the behavior of state courts. As far back as 1809, Chief Justice John Marshall explained that federal diversity jurisdiction reflected the Constitution's "indulgence" of the fear that state courts might be biased in cases involving adverse in-state and out-of-state parties.²⁸

Drawing these observations together, we theorize that many of the same pressures leading state legislative and executive officials to grant preferences to state and local interests at the expense of out-of-state and interstate interests would also affect state court judges in their adjudication of the constitutionality of these measures. To test this theory, we develop the following diversity bias hypothesis: In dormant Commerce Clause cases, state court judges are more likely than their federal counterparts to favor in-state interests over out-of-state interests.

B. Ideological Bias Hypothesis

Since the 1960s, some political scientists have studied judicial behavior under the so-called "attitudinal model," which holds that legal outcomes are influenced by judges' political/ideological and personal backgrounds.²⁹ Others have argued that judges act strategically by behaving as "forward thinking actors" who take into account the choices of their colleagues during the decision-making process.³⁰

Some legal scholars have criticized these models because they tend to downplay the role of legal precedent, the socialization process that reinforces judicial restraint, and the effect of the deliberative decision-making process.³¹ Yet empirical research consistently links extra-legal factors to judicial

²⁸ *Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (1809). Today, preeminent authorities in the field of federal jurisdiction have questioned the continued vitality of the diversity bias justification, arguing that "in a society infinitely more mobile than that of 1789, it is difficult to believe that prejudice against a litigant, merely because he is a citizen of a different state, is a significant factor." CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 150 (6th ed. 2002).

²⁹ See GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* 37 (1965).

³⁰ See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 79 (1998).

³¹ See Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1916-17 (2009).

outcomes.³² For example, Professor Dubois's study of California state appellate judges showed that the partisan composition of appellate panels affected decisions in civil cases.³³ Professor Sunstein's analysis of federal appellate court behavior found that partisan effects may be amplified or dampened depending on the composition of appellate panels.³⁴

With these considerations in mind, we set about the task of developing a theory about how ideology might affect dormant Commerce Clause cases. Immediately, however, we were confronted by the complicating presence of at least three ideologically charged features of our subject: economic regulation, federalism, and constitutional interpretive philosophy.

Dormant Commerce Clause cases by their nature involve laws that regulate and tax businesses and individuals' commercial lives. This brings into play the familiar liberal-versus-conservative debates about the proper level of regulation and taxation in a capitalist society—with liberal political ideology tending to be more tolerant of government regulation and taxation than conservative ideology, which tends to be more *laissez-faire* about these issues.

Since the 1980s, the rise of New Federalism has offered conservatives a countervailing perspective that is more favorable to state governmental regulation. Broadly speaking, conservatives have embraced the notion that states should be granted greater deference and power from the federal government in managing their affairs, and have called for a more limited federal role in state government. In the dormant Commerce Clause context, this translates to a liberal preference for invalidating state laws that interfere with a strong, national common market under the unquestioned control of Congress. Application of strict scrutiny against protectionist laws is consistent with this view, and indeed that is the legacy of the liberal-dominated Supreme Courts of the 1940s through the 1970s. The conservative reaction has been more tolerant of regulatory policies crafted by state governments.³⁵

³² See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265 (1997). Recent research in political science indicates that an individual's partisan affiliation may in fact be genetically inherited. See Jaime E. Settle, Christopher T. Dawes & James H. Fowler, *The Heritability of Partisan Attachment*, 62 POL. RES. Q. 601, 606-07 (2009). Settle et al. hypothesize that since genetic expression is stable over time, so too is an individual's political ideology to some degree. *Id.* at 607. These new findings suggest that it may in fact be more difficult to "socialize away" the innate biological effects of political ideology than legal scholars contend.

³³ See Philip L. Dubois, *The Illusion of Judicial Consensus Revisited: Partisan Conflict on an Intermediate State Court of Appeals*, 32 AM. J. POL. SCI. 946, 957-58 (1988).

³⁴ See Cass Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004). Judges may be influenced by the interactive decision-making process found within panels and the need for a unanimous decision. See LEARNED HAND, THE BILL OF RIGHTS 72 (1958).

³⁵ The *West Lynn Creamery* case is a good illustration. There, Chief Justice Rehnquist (joined by Justice Blackmun) complained about the liberal majority's disregard for the states as the laboratories of democracy. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 216-17 (1994) (Rehnquist, J., dissenting).

The dormant Commerce Clause doctrine compounds the problem because it does not give judges any guidance in how to view the judicial legitimacy of state governments to manage state regulation independent from federal oversight. The doctrine has been developed by judges independent of any explicit constitutional command and linked to Congress's commerce power only by judges' interpretative choices. Again, in broad terms, liberal ideology tends to be more tolerant of these kinds of interpretative moves, while conservative judicial ideology claims to hew to a more originalist line. In the dormant Commerce Clause setting, these preferences have given rise to sharp disagreements at the United States Supreme Court level among liberal and conservative justices about the legitimacy of the dormant Commerce Clause doctrine.³⁶

Mindful of these complications, we hypothesize that the New Federalism advocated by some conservative justices during the past thirty years would emerge as the dominant factor influencing the Court's ideological debates about dormant Commerce Clause doctrine. The advent of New Federalism coincides with the period covered by our study, and today helps define the liberal and conservative "wings" of the Court.³⁷ In the dormant Commerce Clause context, this has translated into conservatives like the late Chief Justice Rehnquist explicitly justifying his votes to uphold state and local laws on federalism grounds.³⁸

With these constraints in mind, we arrived at the following ideological bias hypothesis: consistent with ideological attitudes towards New Federalism, appellate panels dominated by Republican judges will be more likely to uphold state regulations and taxes challenged on dormant Commerce Clause grounds than those panels dominated by Democrats.

C. Shared Borders Hypothesis

Forty-eight of fifty states share a border with another state.³⁹ Neighboring states often share similar socioeconomic and political characteristics, and often look to one another to learn about the relative success of their policies.⁴⁰ In turn, states will often adopt the policies of neighboring states. For example, in their study of whether states chose to adopt lotteries or

³⁶ See, e.g., *West Lynn Creamery*, 512 U.S. 186.

³⁷ Justice Scalia's and Justice Thomas's originalist complaints about the illegitimacy of the dormant Commerce Clause doctrine have not as of yet "lit a fire" under the conservative wing of the Court in the way federalism has. Without broader conservative support of the originalist complaints by other members of the Court, it seemed to us unlikely that lower federal court and state court judges would be strongly influenced by such arguments.

³⁸ See *West Lynn Creamery*, 512 U.S. at 216 (Rehnquist, J., dissenting) (quoting Justice Brandeis's "laboratory" of democracy defense of federalism).

³⁹ Hawaii and Alaska obviously do not. Moreover, they are geographically remote in a way that makes the notion of "neighboring states" less meaningful.

⁴⁰ See Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880, 889 (1969).

relative amounts of welfare benefits, Berry and Baybeck found that policy-makers seek benchmarks from neighboring states and adjust their own policies accordingly.⁴¹ Part of the rationale is that human capital and industries are mobile; states cannot afford to lose people or business if their policies diverge too greatly from their neighbors.

Berry and Baybeck's findings suggested to us that the legislatures of states with relatively more neighboring states ought to be less likely to craft protectionist laws. We theorized that those states with more borders would be more likely to have the kinds of mutually beneficial relationships with neighboring states that foster a non-protectionist approach to regulation. Conversely, we theorized that states with relatively fewer borders would have less experience in the benefits of non-protectionism and therefore would more readily resort to protectionist measures on behalf of in-state businesses under assault from external economic competition. Based on these considerations, we derived our shared borders hypothesis: states with more shared borders are more likely to have their challenged state regulations found to be constitutional by a court than states with relatively fewer borders.

These three hypotheses—the diversity hypothesis, the ideological bias hypothesis, and the shared borders hypothesis—were evaluated against the data derived from our case law analysis. Our methodology is explained in greater detail in the next section.

IV. RESEARCH METHODOLOGY AND FINDINGS

A. Data and Methodology

1. Data Selection

Like most researchers, we were forced to make choices about how to generate our dataset. Any time this occurs, selection bias becomes an issue. Therefore, it is important to understand our particular selection choices before evaluating our data and results. In particular, our selections are limited by choices concerning the timeframe, case type, and the search parameters we used to locate cases.

Timeframe: We examined general dormant Commerce Clause cases decided between January 1970 and March 2009. We chose this timeframe because it encapsulates a statistically robust range of cases that could theoretically employ the modern analysis enunciated in *Pike v. Bruce Church, Inc.*⁴² Our subset of tax cases is limited to the period 1992 to 2009. We imposed this limitation because of difficulties we encountered in locating party affiliation information of state appellate judges prior to the 1990s.

⁴¹ See William D. Berry & Brady Baybeck, *Using Geographic Information Systems to Study Interstate Competition*, 99 AM. POL. SCI. REV. 505, 507 (2005).

⁴² See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Case type: We limited our study to appellate opinions for three reasons. First, although many federal district court opinions are published, few state district court ones are, and we thought it important to have comparable datasets at state and federal levels. Second, appellate opinions are more likely to drive the development of the law based on their precedential or persuasive value than are district court opinions. This makes appellate opinions more crucial to understanding how this body of law may be shaped by the biases and other factors discussed in this article. Third, we believe that appellate cases are more likely to represent instances in which dormant Commerce Clause issues were seriously contested (and not simply a “kitchen-sink” pleading afterthought).

Search parameters: We used Westlaw and LexisNexis to find our cases. Using Westlaw, we reviewed the dormant Commerce Clause cases appearing under the “Commerce” Key Heading and supplemented these cases with a keyword search.⁴³ To further flesh out our dataset, we searched on LexisNexis under the subject heading “dormant commerce clause.”

We are cognizant of three potentially significant drawbacks with the selection approach outlined above. First, we do not capture the universe of all dormant Commerce Clause cases. Our timeframe constraints probably result in relevant cases being left out. Our choice of relying on appellate opinions means that we do not include cases that settle or are not appealed.⁴⁴ Second, our approach may mask instances in which appellate judges find themselves constrained by ideologically motivated decisions made at the lower court regarding, for example, admissibility of evidence concerning impacts on interstate commerce. Third, Westlaw and LexisNexis editors choose which cases to put in their databases, which could potentially lead to selection bias in the study.⁴⁵ We seek to minimize selection bias by comparing the database of cases to other independent variables that come from completely different sources such as judicial forum, party ideology, and geography.

Despite these drawbacks, we are confident that we have a robust and representative dataset for several reasons. First, our approach yielded 459 appellate cases—a significant number—and we have no reason to think that our method of selecting these cases would have introduced any systematic bias that influences our independent variables. Second, the kinds of cases we chose are

⁴³ Our keyword search was “dormant or negative w/s ‘commerce clause’ or ‘interstate commerce’” in the Westlaw search engine.

⁴⁴ See Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC’Y REV. 1133, 1133-34 (1990). To read more about selection bias, see Susan M. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782 (1992). Olson notes that cases will be published if there are specialized reporters for the area of law, or judges perceive the issue to raise important legal questions. *Id.* at 787, 791. More complex cases are more likely to be published. This raises the question of how “complex” dormant Commerce Clause cases are viewed.

⁴⁵ See *Case Summaries and LexisNexis Headnotes*, LEXISNEXIS, http://support.lexisnexis.com/lawschool/record.asp?ArticleID=root_cs_cc (last visited July 20, 2011).

the kinds of cases that lawyers (and judges) rely on; we would expect that judicial biases would be reflected in these kinds of cases precisely because of their precedential or persuasive character. Third, we coded concurrences and dissents when explaining an individual judge's behavior to provide a more detailed picture of each case. Finally, the fact that federal appellate judges are usually randomly assigned to cases lowers the effects of selection bias among federal cases.⁴⁶

2. Coding and analytical methodology

We code the political ideology of state appellate judges using a dichotomous variable for partisan affiliation.⁴⁷ Biographical, newspaper, and political data sources are used to identify the partisan affiliation of state intermediate appellate judges. To measure the political ideology of state supreme court judges, we rely on Professor Langer's Natural Courts Database.⁴⁸

At the federal level we use the party affiliation of the appointing president as a proxy for the party affiliation of federal judges. In doing so, we adopted Sunstein's assumption that a president will take into account ideological differences between conservative and liberal judges when choosing whom to nominate to the bench.⁴⁹ Schmidhauser notes that the president is likely to

⁴⁶ See Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 259 (1995).

⁴⁷ This is 0 = Republican, 1 = Democrat. We use a logit model for testing the relationship between our dependent variable, dormant Commerce Clause outcome, and our independent variables, partisan ideology and geography. For more information on logit regression, see J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 34-113 (1997).

⁴⁸ *Langer Natural Courts Database from NSF Grant*, LAURA LANGER FACULTY WEBPAGE, <http://www.u.arizona.edu/~llanger/NSFNaturalCourtsData.htm> (last visited July 21, 2011). Langer's database utilizes a more accurate and nuanced measurement of a state supreme court judge's ideology than pure partisan affiliation. See Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 397-98 (2000). The Party-Adjusted Judge Ideology Score (PAJID) for each judge is calculated by "estimating the elite ideologies for appointed judges and citizen ideologies for elected judges." *Id.* at 397. A logit analysis is used "to predict partisan affiliations as a function of the judges' composite ideology score." *Id.*

Using the probabilities obtained from this analysis, we computed pseudo residuals by subtracting them from the observed value of Y. This provides an estimate of how much the composite ideology measure needs to be adjusted for the unique information party affiliation provides. To weight the ideology score, we then multiply the pseudo residual by the composite measure of ideology and add the product to the composite ideology measure to produce the party-adjusted judge ideology score (PAJID).

Id. at 397-98.

⁴⁹ See Sunstein et al., *supra* note 34, at 303. As Sunstein et al. note, a Democratic president will not want to appoint a federal appellate judge that will most likely overturn *Roe v. Wade*. *Id.* Sunstein et al. found a statistically significant relationship whereby judges appointed by Republican presidents tend to be more conservative than judges appointed by Democratic presidents. *Id.* at 303-05.

appoint appellate judges who are “ideologically committed” to the values of the president.⁵⁰ Previous research confirms that political ideology, though not an overpowering factor, does sway decision-making.⁵¹

We performed a logit regression to test the likelihood that forum, political ideology, and geography influence the judicial panel’s decision. The logit regression model takes the form:

$$Y(\text{Case Outcome}) = A_0 + B_1(\text{Court Forum}) + B_2(\text{Political Ideology}) + B_3(\text{Geography})$$

Our dataset and codebook are available upon request.

B. Findings

The dormant Commerce Clause doctrine intersects with a wide range of social issues. Table 1.1 identifies the types of claims brought to each court and reveals that federal appellate courts are more likely to hear challenges to state regulations centering on economic competition, business regulation, environmental protection, garbage, alcohol, and consumer protection. For example, a typical economic competition claim centers on state regulations that tend to advantage in-state businesses, such as using in-state suppliers or setting price floors for in-state manufacturers or retailers.⁵² State court dormant Commerce Clause dockets are dominated by tax claims; 57% of all dormant Commerce Clause claims in state court involve a tax dispute.⁵³

1. Findings on Diversity Hypothesis

Our findings confirm our hypothesis that the forum of the dispute matters: state courts are more likely than federal courts to uphold state and local laws against dormant Commerce Clause challenges. We first removed tax cases from the dataset for this portion of the analysis because tax cases rely on a different legal framework than do state and federal regulation cases (the *Complete Auto* and *Pike* frameworks, respectively). We then performed a logit regression analysis of the 300 remaining state and federal regulation cases. Table 1.2 highlights the results, which show that state court panels are more likely to

⁵⁰ John R. Schmidhauser, *The Background Characteristics of United States Supreme Court Justices*, in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 226 (Glendon A. Schubert ed. 1964).

⁵¹ See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1471 (2003).

⁵² See, e.g., *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41 (1st Cir. 2005); *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd.*, 462 F.3d 249 (3d Cir. 2006).

⁵³ Forty seven percent of all tax disputes are brought by in-state appellants, while 53% are brought by out-of-state appellants.

uphold challenged laws under the dormant Commerce Clause while federal courts are more likely to invalidate challenged state or municipal laws.⁵⁴

To further unpack what is driving state court appellate judges to systematically uphold in-state and local regulations as constitutionally valid, we hypothesize that state judicial retention elections and the public's general acceptance of state regulation might be affecting the local judge's decision-making. We performed a logit regression of a subset of eighty-five cases using a variable created by Professors William Jacoby and Saundra Schneider which encapsulates yearly state expenditures in nine policy areas.⁵⁵ Table 1.3 and Table 1.4 highlight how the average partisan identification of the state court and the state's willingness to spend monies on progressive policies conditioned on the state's retention mechanism influence dormant Commerce Clause votes.⁵⁶ Table 1.3 shows that the strongest independent predictor for whether a court will uphold a law challenged on dormant Commerce Clause grounds is the state's policy priorities. More specifically, judges are more apt to find regulations to be constitutionally sound in progressive states known to have a history of embracing policy innovation and "aggressively taking positive steps with social problems as they arise."⁵⁷ Conversely, state regulations are more likely to be found invalid in states that are "more cautious in their orientations toward government involvement in social and economic issues."⁵⁸ Notably, Table 1.4 shows that state court judges are not upholding state regulations in more progressive states simply because they are facing re-election.

Municipal and state tax laws are an entirely different matter. Table 1.5 highlights how the partisanship of the judicial panel is by far the strongest predictor in explaining whether a challenged state and municipal tax is upheld. Democratic judicial panels are more likely to uphold a disputed tax than Republican judicial panels. Tax cases seem to be an area where judges are apt to vote according to their partisan philosophies irrespective of other external pressures.

Tables 1.6 and 1.7 show that federal appellate courts were more likely to invalidate through all phases of the analysis than were state appellate courts. For laws alleged to be facially discriminatory or discriminatory in effect, state courts upheld the challenged laws 82% and 94% of the time, respectively. The

⁵⁴ The results mean that a party challenging a state regulation in state court increases the odds that the regulation will be upheld as constitutionally valid by 2.14% compared to challenging the regulation in federal appellate court.

⁵⁵ See William G. Jacoby & Saundra K. Schneider, *A New Measure of Policy Spending Priorities in the American States*, 17 POL. ANALYSIS 4-5 (2009). The nine policy areas are: corrections; education; government administration; health; highways; hospitals; parks and natural resources; law enforcement; and welfare. *Id.* at 10.

⁵⁶ This database is available for replication. A dichotomous variable was created to measure the retention method of the state: 1 = judge was exposed to some type of retention mechanism; 0 = judge appointed for life with no retention election.

⁵⁷ Jacoby & Schneider, *supra* note 55, at 13.

⁵⁸ *Id.*

corresponding “uphold” rates in federal courts are lower: 74% and 77%. For laws analyzed under the *Pike* balancing test for non-protectionist laws, state courts invalidated in 11% of all cases, while the invalidation rate in federal courts is a bit higher at 16%.⁵⁹ Although the sample size for market participant claims is too low to discern any statistical pattern, in state courts this type of defense was successful in 40% of the cases where it was raised, while in federal court the success rate was only 7%. All of these results support our hypothesis that state courts are more welcoming of dormant Commerce Clause claims.

We found other intriguing differences between state and federal fora. At the trial court level, we found that federal district courts and state trial courts differed in how they initially disposed of dormant Commerce Clause cases—at least for cases that were appealed.⁶⁰ For these cases, state district courts initially upheld disputed state/local regulations as constitutionally valid 72% of the time, while federal district courts upheld 60% of the time.⁶¹ Decision patterns differ at the appellate level as well.⁶² Tables 1.8 and 1.9 highlight the rates of affirmance and reversal for state and federal courts. At first blush they appear quite similar: a 76% affirmance rate in state courts and a 71% rate in federal courts. But very interesting differences between the state and federal court systems become apparent once the character of the trial court disposition is taken into account. In cases where the lower court upheld the challenged law, state appellate courts were much more likely to affirm (64%) than were federal appellate courts (48%). In cases where the lower court invalidated the challenged law, the pattern is reversed: federal appellate courts were more likely to affirm (23%) than state appellate courts (12%).

2. Findings on Ideological Bias Hypothesis

When testing the ideological bias hypothesis in state courts, we are unable to reject the null hypothesis that there is no relationship between the political ideology of a state court judicial panel and dormant Commerce Clause outcomes.⁶³ Instead, the judicial forum, or “hometown” factor, is the principal

⁵⁹ When a court finds that a disputed regulation is neither facially discriminatory nor discriminatory in purpose or effect, the next step is to apply the *Pike* balancing test. State courts did not reach the *Pike* test 23% of the time; federal courts did not reach *Pike* 18% of the time.

⁶⁰ To reiterate, our dataset included only appellate cases and did not include district court level cases that were never appealed.

⁶¹ Excluding agency review, initial state review will uphold the state regulation 71% of the time. The difference in behavior between federal district and state trial courts is statistically significant at the .05 level using a chi-square test.

⁶² A chi-square test for independence between the initial decision and appellate review in state and federal courts is statistically significant at the .001 level. This only includes state and federal regulations; state tax cases are omitted.

⁶³ The strongest predictor is the forum, a state court. Party identification is not statistically significant.

variable driving decision-making in the state courts, controlling for political ideology and geography.

In the federal appellate courts, however, we see a different story. We have tentative findings showing a link between political ideology and judicial outcomes at the appellate level. From spring 1992 to 2009, we find that federal appellate judicial panels with Republican-appointee majorities were more likely to find a disputed regulation to be invalid; conversely, majority Democratic judicial panels were more likely to uphold the disputed regulation.⁶⁴ These findings run opposite to our hypothesized outcomes, which predicted that conservative judges would uphold laws more often than liberal ones, based on federalism considerations. Instead, the outcomes correlate more closely with traditional conservative and liberal attitudes towards economic regulation. In order to investigate judicial behavior further, we examined the results separately for each individual federal appellate court judge, taking into account dissents in the cases. Under a logit regression, we controlled for individual level partisanship, and geography. We found that the individual partisan ideology of the judge continues to influence dormant Commerce Clause outcomes during the same time period.⁶⁵

State tax disputes are an area where judicial ideologies tend to rise to the surface. As explained in part II above, state courts are essentially the sole venue in which a dormant Commerce Clause tax claim can be heard.⁶⁶ Controlling for all other factors, state appellate judicial panels with Democratic majorities are more likely to uphold a disputed state tax than Republican-dominated judicial panels.⁶⁷ For each additional percent of the judicial panel that is Republican, the odds that the tax case will be decided as unconstitutional increase by 3%.

A few other observations about tax cases are in order:

1. Appellants may make several different kinds of arguments against a state or municipal tax regulation under *Complete Auto*. Table 1.10 breaks down the likelihood that a regulation will be found discriminatory based on the *Complete Auto* test.⁶⁸ Among

⁶⁴ Out of 133 of a possible 174 cases, this result is statistically significant at the .05 level, with the one-tail test. The coefficient is -.012, standard error .006. This means that for each percent the judicial panel becomes more Republican, this increases the odds that the court will find the statute unconstitutional by 1%.

⁶⁵ There is a one-year lag between the two. N = 414 individual judges from late 1993-2009. The individual political ideology of federal appellate judges, taking into consideration dissents, is statistically significant at the .05 level with one-tail test. Coefficient is -.003, standard error of .0021.

⁶⁶ See *supra* Part II.B.

⁶⁷ N = 156 cases. R-squared = .07. The logit coefficient was -.0271, standard error of .007, and statistically significant at the .001 level. This means that each additional percent of the judicial panel that is Democratic depresses the odds that the case will be decided as unconstitutional by about 3%.

⁶⁸ Tax disputes employ a four-part test from *Complete Auto*. CHEMERINSKY, *supra* note 7, at 456. According to Chemerinsky, "a state tax does not violate the commerce clause if: (1) it is applied to

published opinions, appellants are most likely to argue the existence of a substantial nexus with the state (N=75), whether the tax is fairly apportioned (N=78), or if the tax is discriminatory (N=62). They are less likely to make the claim that the tax is not fairly related to the services provided (N=38). Seventy-nine percent of all tax claims are upheld in state appellate court.

2. A large majority of all tax cases begin with a state tax commission or department of revenue making an initial determination that the taxpayer must pay a specific tax. Upon appellate review, the agency's determination is upheld 75% of the time.⁶⁹
3. Out-of-state appellants initiated 53% of all appeals of tax cases, and won 78% of the cases, compared with a 57% success rate for in-state appellants.⁷⁰ A logit regression controlling for party identification of court and geography reveals that an out-of-state appellant is statistically more likely to win a state tax case than an in-state appellant, controlling for the political ideology of the judicial panel.⁷¹

3. Findings on Shared Borders Hypothesis

Finally, we could not reject the null hypothesis that there is no relationship between dormant Commerce Clause outcomes in state courts and the number of geographic borders of a state.

V. EXPLANATIONS

In this section we attempt to explain the findings described above. We also speculate about future research directions based on our findings.

A. Diversity Bias: State Judges and State Political Cultures

The data supports our hypothesis that state courts are more likely than federal courts to uphold non-tax state and local laws challenged under the dormant Commerce Clause doctrine. This pattern is consistent with the traditional concern that many state court judges are less insulated from day-to-day politics and public opinion than their life-tenured federal counterparts.

an activity with a substantial nexus to the taxing state; (2) it is fairly apportioned so as to tax only the activities connected to the taxing state; (3) it does not discriminate against out-of-staters; and (4) it is fairly related to services provided by the state." *Id.*

⁶⁹ Agencies set tax standards for appellants in 108 cases.

⁷⁰ Out-of-state appellants filed eighty-two cases. In-state appellants filed seventy-two cases. In four cases, both in-state and out-of-state parties appealed the initial ruling.

⁷¹ Out of 151 cases, the coefficient is -.801, standard error of .0078, and is statistically significant at the .05 level ($p = .033$). R-squared = .10.

We tentatively see some connection between a state's political culture and case outcomes. In our study, innovative states that exhibit a greater financial commitment towards spending on programs such as welfare, hospitals, and health care are more apt to have their state regulations upheld under a dormant Commerce Clause challenge than states that refrain on spending as much in these policy areas. One possible explanation is that state appellate judges are not immune to the political culture of the state, and judges from progressive states view governmental regulation as a legitimate method for overseeing new ideas or policies.

Another factor at play is the complexity of dormant Commerce Clause doctrine and the presumptions underlying judicial review. It is a basic tenet of judicial review that acts of a legislature are to be upheld if there is any constitutionally viable means of doing so. Adjudication under the dormant Commerce Clause doctrine is notoriously complicated, leading Justice Thomas to declare that it "makes little sense, and has proved virtually unworkable in application."⁷² Now consider that state appellate judges make decisions for a single state, while federal appellate judges make law on a circuit-wide basis. Under these circumstances, the two groups of judges may have different tolerances for invalidating state laws that serve important state interests (or important state constituencies) under arcane federal constitutional doctrines.

One final observation deserves discussion. We noted that out-of-state appellants are more likely to be successful in their state court tax challenges than are in-state appellants. There are a few potential explanations for this finding. Out-of-state appellants facing higher transaction costs than in-state appellants could potentially be acting strategically in choosing to only bring cases they strongly believe will be successful before the court. Another potential explanation is that out-of-state appellants find it easier to make a dormant Commerce Clause argument than in-state appellants because they can more readily point to their own injury as an example of state discrimination against out-of-state economic interests. An in-state appellant may not have this advantage and may be forced to make a more convoluted argument about interstate discrimination.

B. Ideology Bias: Free Market Trumps Federalism

The results for our ideological bias hypothesis are mixed. To review, although we recognized the predictive complexities as explained in part II above, we expected ideological signals associated with New Federalism emerging from the United States Supreme Court would resonate in the lower courts more loudly than traditional attitudes towards economic regulation. Our findings suggest that we had it exactly backwards: at any point where we found a statistically

⁷² *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 611 (1998) (Thomas, J., dissenting).

significant relationship between political affiliation and dormant Commerce Clause outcomes, we found that Republican judges were more likely to invalidate state laws than Democratic judges. Plainly, this is not what our hypothesis predicted, and it suggests that New Federalism may not be as compelling a value as it sometimes seems and that free market principles may trump federalism concerns.

Within the federal appellate court data we see that at least from 1992 through March 2009, Democratic appointees tended to uphold state and municipal regulations. Moreover, despite the fact that Democratic appointees are often outnumbered on federal appellate panels, Democratic appointees did not appear significantly subject to panel effects; that is, they maintained their judicial independence and were not easily swayed by their Republican peers in these cases. In state cases, we also observed that political ideology becomes more systematically pronounced in tax cases. Democratic panels were more likely to uphold tax laws while Republican panels were more likely to invalidate.

Another possible explanation for these findings is that judges at the appellate levels are more likely to be swayed by the concrete impacts of regulations and taxes than by the abstract and academic debates over the proper calibration of our federal system. The purported benefits and burdens of a new environmental regulation or a tax to fund new services to the actual plaintiffs and defendants in the courtroom may be more readily predicted and understood than the impacts of these measures on the balance of power between states and the federal government.

VI. A NORMATIVE RECOMMENDATION: REFORM THE FTIA TO PERMIT ANTI-PROTECTIONISM CLAIMS IN FEDERAL COURT

This section uses the findings above as they pertain to tax cases and argues for reform of the jurisdiction-stripping features of the FTIA. It first identifies the fairness and federalism rationales underlying the law and then critiques the efficacy of the Act in light of the outcomes actually observed in dormant Commerce Clause cases. The section concludes by considering whether judicial or legislative reforms might best address the identified disparities.

A. Unintended Consequences of the FTIA for Dormant Commerce Clause Litigants

The United States Supreme Court has identified two policy rationales for the FTIA, based on legislative history. These may be referred to as the argument from fairness and the argument from federalism.

The argument from fairness contends that the FTIA is necessary “to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required

taxpayers to pay first and litigate later.”⁷³ To the extent that this first justification claims to be rooted in fairness, our data should be cause for a re-evaluation of the statute, for in the effort to foreclose a *potential* inequity the law seems to have generated an *actual* one. Our data suggests that the FTIA’s real effect is to force out-of-state plaintiffs to contend with state court systems that are more likely to rule against their interests than their federal counterparts. With no recourse to federal courts, dormant Commerce Clause tax plaintiffs have no choice but to confront this bias in the state court system.

Additionally, there is reason to believe that such plaintiffs also face less predictable outcomes due to amplified ideological bias in state courts. Our results show a correlation between party identification and dormant Commerce Clause outcomes in both state and federal systems. But unlike federal judges, most state court judges face election. The absence of political insulation in the state context may result in state judicial panels swinging more strongly to the left or right than federal panels. Such amplified ideological bias would make predicting dormant Commerce Clause case outcomes that much more difficult.

Capping things off, the FTIA permits state courts to operate secure in the knowledge that the only federal review their decisions might receive is the infrequent review of state court dormant Commerce Clause tax decisions by the United States Supreme Court—what Professor Zelinsky calls the “the cert lottery.”⁷⁴ Without the potential for a federal judicial option to potentially serve as a “reality check” in the development of doctrine, the kinds of biases identified above become precedential and self-reinforcing. Together, these problems significantly undermine the FTIA’s fairness rationale.

The second rationale identified by the Court as justifying the FTIA is “to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances.”⁷⁵ This justification by its terms is less about fairness to litigants and more about considerations of federalism and comity. Of course, these are important values that are essential to the health of our federal system. But so is the principle of anti-discrimination that lies at the heart of the dormant Commerce Clause doctrine. And to the extent that state courts are in the aggregate less inclined to side with dormant Commerce Clause plaintiffs—as our findings indicate is the case—the FTIA seems to be operating at cross-purposes with this second rationale as well as the first.

As a normative matter, then, this analysis suggests the need for some adjustment of the FTIA’s allocation of federal jurisdiction in dormant Commerce Clause discrimination cases, both because these cases may not be fairly and adequately addressed by state courts and because those unfair outcomes may in turn corrode the federal system in ways that both the FTIA and the doctrine were meant to avoid.

⁷³ *Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (citing S. REP. NO. 75-1035, at 1-2 (1937)).

⁷⁴ Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 63 (2008).

⁷⁵ *Hibbs*, 542 U.S. at 104 (citing S. REP. NO. 75-1035, at 1-2).

B. The “Plain, Speedy and Efficient” Exception and a Judicial Remedy

One possible solution is to argue based on our findings that in dormant Commerce Clause discrimination cases, state courts do not provide the “plain, speedy and efficient” remedy necessary to divest federal courts of their jurisdiction.⁷⁶ Below we outline this argument and the likely counter-arguments to such a proposal.

The United States Supreme Court has interpreted the “plain, speedy and efficient” language in the FTIA to require that taxpayers have the opportunity for judicial determination of federal constitutional objections to a state tax in state court; absent such an opportunity, federal courts will retain jurisdiction.⁷⁷ In *Hillsborough Township v. Cromwell*, the United States Supreme Court applied this exception to preserve federal jurisdiction over a taxpayer’s Equal Protection discrimination challenges to a New Jersey tax assessment.⁷⁸ This case is key to the argument against application of FTIA to dormant Commerce Clause claims. The *Cromwell* court first observed that under a long string of New Jersey cases, a taxpayer claiming discrimination was not permitted to seek a reduction of his own tax assessment; instead, the only remedy available under these cases was to seek to increase the taxes of the other members of the plaintiff’s class.⁷⁹ The Court found it “plain” that this historical remedy was “not adequate to protect respondent’s rights under the federal Constitution.”⁸⁰ The state argued that a 1933 state court case had changed this rule and recognized a remedy adequate to vindicate federal rights—and divest federal courts of jurisdiction.⁸¹ But after reviewing the case law, Justice Douglas wrote on behalf of a unanimous court that “there is such uncertainty concerning the New Jersey remedy as to make it speculative whether the State affords full protection to the federal rights.”⁸²

It may be possible to make arguments along the lines of *Cromwell* that there is uncertainty about the availability of a remedy in state courts for dormant Commerce Clause tax plaintiffs and that it is speculative whether a state court affords full protection to these plaintiffs’ federal constitutional rights under the Commerce Clause. Our data suggest that state court decision-making is affected by diversity bias of the sort traditionally justifying the imposition of federal

⁷⁶ 28 U.S.C. § 1341 (2011).

⁷⁷ *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503 (1981).

⁷⁸ 326 U.S. 620 (1946). The statute at that time was codified as 28 U.S.C. 41(1), and provided that “no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax law imposed by or pursuant to the laws of any State where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such State.” The phrase “imposed by or pursuant to the laws of any State” was changed to “under State law” and the phrase “at law or in equity” was dropped when the statute was recodified in 1948 as section 1341. See June 25, 1948, c. 646, 62 Stat. 932.

⁷⁹ *Cromwell*, 326 U.S. at 624.

⁸⁰ *Id.*

⁸¹ *Id.* at 624-25.

⁸² *Id.* at 625 (internal citation omitted).

jurisdiction. Diversity bias operates to the detriment of tax plaintiffs, while ideological bias is something of a wildcard—liberals are more likely to favor the state while conservatives are more likely to favor plaintiffs. In any event, the statistically demonstrable presence of these two kinds of bias generates the kind of uncertainty that arguably justifies providing another forum for litigants to bring the claim, namely the federal forum.

The attentive reader will have observed that we have been careful to qualify our claims in favor of these arguments. That is because these arguments face significant, perhaps insurmountable, barriers from the judicial branch. First, simply to advance these arguments based on our data would require the courts to admit that because the aggregated outcomes across the fifty states tend to reflect these two kinds of bias, it is reasonable to assume that a specific state court in a specific case is tainted by a pervasive, systematic bias in favor of state regulation. It seems to us unlikely that a federal court would be willing to make these leaps, especially when weighed against considerations of federalism and comity.

Second, even if these barriers were surmountable, there remains the problem that in a later opinion, the Court arguably recast *Cromwell* as a case involving the absence of adequate procedures for dealing with constitutional claims, rather than a case in which the available remedies were constitutionally inadequate. In *Rosewell v. LaSalle National Bank*, the Court was at pains to discuss the procedural character of the “plain, speedy and efficient remedy” language, and in this context recast *Cromwell* as an elaboration on the procedural meaning of the term “plain”:

Earlier cases, without making a direct connection to the word “plain,” have held that “uncertainty” surrounding a state-court remedy lifts the bar to federal-court jurisdiction. Respondent has made no argument that the Illinois refund procedure is uncertain or otherwise unclear. There is no question that under the Illinois procedure, the court will hear and decide any federal claim.⁸³

True, there are circumstances in our constitutional law where bias may rise to the level of a due process defect.⁸⁴ But again, it is probably asking too much to expect a federal court to impute such bias in a specific tax case based on our data alone.

C. A Legislative Remedy: Amending the FTIA to Permit Anti-Protectionism Claims in Federal Court

The problems described above are really problems associated with trying to leverage our statistical findings in a judicial setting. No such difficulties arise

⁸³ 450 U.S. 503, 517 (1981) (internal citations omitted).

⁸⁴ See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975) (stating that a “fair trial in a fair tribunal is a basic requirement of due process”) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

in the legislative setting. Indeed, in framing the FTIA, Congress made broad assumptions about the unfair advantages out-of-state tax litigants would have over in-state taxpayers if provided access to federal courts as well as the anticipated federalism and comity benefits. Our data suggest that as an empirical matter the FTIA may actually operate to the detriment of these values.

Amending the FTIA to permit federal question jurisdiction over challenges to state tax laws based on the discrimination prong of the dormant Commerce Clause doctrine would permit both in-state and out-of-state litigants to have access to federal courts, alleviating fairness concerns over bias for regulation in the state forum. We recognize that this does not allay the partisan bias found in both state and federal courts. Also, some tax plaintiffs may be tempted to devise tenuous dormant Commerce Clause claims simply to take advantage of federal jurisdiction. In response, however, we believe that federal courts should be capable of using summary judgment, Federal Rule of Civil Procedure 11, and the discretion to decline pendent jurisdiction to manage problematic claims. Overall, it appears to us that some kind of legislative fix is better suited than the potential judicial work-around described under the FTIA's "plain, speedy and efficient" clause.

VII. CONCLUSION

This study provides tentative evidence that the dormant Commerce Clause doctrine is not immune to the strategic behavior of judges: state court judicial panels favor in-state appellants. However, further analysis suggests that state court judges are not so much influenced by the need to cultivate a strong local constituency for re-election. Rather, the judges' decision tends to reflect the state's general policy priorities.⁸⁵

This study also illustrates that political ideology matters—though not in the ways we had predicted. Republican judges are more likely to invalidate state regulations than their Democratic counterparts, contrary to federalism-based expectations. In tax cases, both Republican and Democratic judges were strongly swayed by partisan ideology: state Republican judicial panels were more likely to overturn state taxes as constitutionally invalid than Democratic judicial panels. We also found that out-of-state appellants are more successful in receiving favorable rulings in tax cases controlling for the political ideology of the judicial panel.

These findings suggest that although politics matters, politics may mean very different things at different levels of the judicial system. We believe that this conclusion presents the most interesting opportunities for future research.

⁸⁵ This observation has some intriguing implications for federalism-based objections to the dormant Commerce Clause doctrine. One of the principal conservative complaints about the doctrine is that it inhibits states from serving as "laboratories of democracy." See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 216-17 (1994) (Rehnquist, J., dissenting). The fact that state court judges seem to find ways to conform their dormant Commerce Clause rulings to their state's prevailing political cultures suggests that this inhibition may be less powerful than imagined.

VIII. APPENDIX OF TABLES

Table 1.1 Type of Dormant Commerce Cause Claim by State and Federal Court

Issue	State Courts (%)	Federal Courts (%)
Economic Competition	9	13
Business Regulation	3	14
Environmental Protection	5	9
Child Safety Protection	4	1
Highway Regulation	2	3
Garbage Regulation	5	23
Alcohol Regulation	1	6
Tax	57	0
Zoning	1	4
Consumer Protection	8	17
Professional Regulation	1	2
Other	4	8
Total	100	100

N = 285 state

N = 174 federal

Table 1.2 **Effect of Forum, Judicial Partisan Ideology, and Number of Neighboring States on Dormant Commerce Clause Outcomes⁸⁶**

<u>Independent Variable</u>	<u>Whether Muni/State Reg Constitutional</u>
State Forum	.761** (.264)
Average Party ID of Judicial Panel	-.0027 (.0047)
Number of Neighboring States	.013 (.072)
Constant	-.013* (.41)
N	300
Pseudo R-Squared	.03

⁸⁶ Entries are logit coefficients with standard errors in parentheses. * $p \leq .05$, ** $p \leq .01$ for two-tailed tests.

**Table 1.3 Explaining Outcome of State/Municipal Regulation Cases by
Judicial Partisan Ideology, State Progressivism Index, and
Judicial Retention Mechanism⁸⁷**

<u>Independent Variable</u>	<u>Whether Muni/State Reg Constitutional</u>
Progressive Policy Index	-6.7* (4.2)
Retention Mechanism	.26 (.71)
Party ID Average	.0022 (.011)
Constant	-1.7* (.89)
N	85
Pseudo R-Squared	.031

⁸⁷ Entries are logit coefficients with standard errors in parentheses. * $p \leq .05$ for one-tailed tests.

Table 1.4 **Explaining Outcome of State/Municipal Regulation Cases by Judicial Partisan Ideology, State Progressivism Index, Judicial Retention Mechanism, and Interactive Effects⁸⁸**

<u>Independent Variable</u>	<u>Whether Muni/State Reg Constitutional</u>
Progressive Policy Index	-4.2 (7.8)
Retention Mechanism	.26 (1.01)
Progressive Policy x Retention Mechanism	-3.5 (9.4)
Party ID Average	.0030 (.011)
Constant	-1.5 (1.0)
N	85
Pseudo R-Squared	.032

⁸⁸ Entries are logit coefficients with standard errors in parentheses. * $p \leq .05$ for one-tailed tests.

**Table 1.5 Explaining Outcome of Disputed State/Municipal Tax Cases
by Judicial Partisan Ideology, State Progressivism Index,
and Judicial Retention Mechanism⁸⁹**

<u>Independent Variable</u>	<u>Whether Muni/State Reg Constitutional</u>
Progressive Policy Index	-3.6 (5.6)
Retention Mechanism	.037 (.89)
Progressive Policy x Retention Mechanism	-3.9 (6.74)
Party ID Average	-.035** (.011)
Constant	.47 (.91)
N	116
Pseudo R2	.088

⁸⁹ Entries are logit coefficients with standard errors in parentheses. $*p \leq .05$, $**p \leq .01$ for two-tailed tests.

Table 1.6 Analysis of State Regulations in State Court

	Upheld as Constitutional (%)	Found Unconstitutional (%)	Remand (%)
State regulation facially discriminatory (N=83)	82	17	1
State regulation discriminatory in purpose or effect (N=70)	94	6	-
<i>Pike</i> analysis (N=75)	89	11	-
Pass facial disc/disc purpose, then <i>Pike</i> analysis ⁹⁰ (N=53)	75	2	-
State is Market Participant (N=10)	40	60	-
Privilege and Immunities (N=7)	71	29	-

N = 126. Two cases remanded to see if they were facially discriminatory.

⁹⁰ Of the 53 cases where the state regulation was not found to be facially discriminatory or discriminatory in purpose or effect, the court held that the regulation passed the *Pike* analysis in 42 cases. In 12 cases (23%), however, the court did not perform a *Pike* analysis.

Table 1.7 Analysis of State Regulations in Federal Court

	Upheld as Constitutional (%)	Found Unconstitutional (%)	Remand (%)
State regulation facially discriminatory (N=138)	74	24	2
State regulation discriminatory in purpose or effect (N=129)	77	20	3
<i>Pike</i> analysis (N=100)	74	16	10
Pass facial disc/disc purpose, then <i>Pike</i> analysis ⁹¹ (N=86)	72	5	5
State is Market Participant (N=15)	7	80	13
Privilege and Immunities (N=11)	55	27	18

N = 174.

⁹¹ Of the 86 cases where the state regulation was not found to be facially discriminatory or discriminatory in purpose or effect, the court held that the regulation passed the *Pike* analysis in 62 cases. In 16 cases (19%), however, the court did not perform a *Pike* analysis.

Table 1.8 Reversal Rates of Initial Dormant Commerce Claims in State Court

		Appellate Review	
		No Dormant Commerce Clause Violation (%)	Dormant Commerce Clause Violation (%)
Initial Decision	No Dormant Commerce Clause Violation (%)	64	8
	Dormant Commerce Clause Violation (%)	16	12

N = 126. Four cases remanded.

Table 1.9 Reversal Rates of Initial Dormant Commerce Claims in Federal Court

		Appellate Review	
		No Dormant Commerce Clause Violation (%)	Dormant Commerce Clause Violation (%)
Initial Decision	No Dormant Commerce Clause Violation (%)	48	12
	Dormant Commerce Clause Violation (%)	16	23

N = 174. Eleven cases remanded.

Table 1.10 Frequency of Tax Claim and Success Rate in State Court

Type of Claim	Likelihood Claim will be Constitutionally Valid	
	Passes (%)	Fails (%)
Company has Substantial Nexus With State (N = 75)	89	11
Tax Fairly Apportioned (N = 78)	78	22
Tax Does Not Discriminate (N = 62)	61	38
Tax Fairly Related to Services Provided (N = 38)	92	8
Average (N = 255 tax claims)	79%	21%

N of all tax cases = 159. One case remanded.